

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1005515-001-B

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In the Matter of:

XXXXXXXXXX XXXXXXXXXXXXX.  
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X/X XXXXXXXX X. XXXXXX XXX.  
XXXXXXXX & XXXXX  
XXXXXXXX XXXX XXX  
XXX XXXXXX XXXXXXXXXXX XXX.  
XXXXXXXX, XX XXXXX-XXXX

ESA TAX UNIT  
C/O ROBERT DUNN  
ASSISTANT ATTORNEY GENERAL  
1275 WEST WASHINGTON CFP/CLA  
PHOENIX, AZ, 85007

Employer

Department

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**DECISION**  
**REVERSED IN PART**  
**SET ASIDE IN PART**

THE **EMPLOYER**, through counsel, petitions for a hearing from the Reconsidered Determination issued by the Department on January 25, 2006, which affirmed the Department's Determination of Liability for Employment or Wages issued November 30, 2005, which held that services performed by individuals as off-duty police officers (ODPO) constitute employment and remuneration paid to individuals for such services constitutes wages.

The petition for hearing has been timely filed. The Appeals Board has jurisdiction in this matter pursuant to Arizona Revised Statutes § 23-724(B).

At the direction of the Appeals Board, a hearing was held on September 11, 2005, in Phoenix, Arizona, before William E. Good, Administrative Law Judge, for the purpose of considering the following issues, of which all parties were properly noticed:

1. Whether the Employer is liable for Arizona Unemployment insurance taxes beginning [January 1, 2004], under A.R.S. § 23-613.

2. Whether services performed by individuals as off-duty police officers constitute employment as defined in A.R.S. § 23-615, and are not exempt or excluded from coverage under A.R.S. §§ 23-613.01, 23-615, or 23-617.
3. Whether remuneration paid to individuals for such services constitutes wages as defined in A.R.S. § 23-622, which must be reported and on which State taxes for unemployment insurance are required to be paid.

The following persons were present at the hearing:

XXXXXXXXX XXXXXX	Employer witness
XXXXXXXXX XXXX	Employer witness
XXXXXXXXX XXXXX	Employer Counsel
XXXXXX XXXXXX	Department witness
XXXX XXXX	Department witness
ROBERT J. DUNN	Department Counsel

At the hearing, witnesses were sworn and testified, and Board Exhibit Nos. 1 through 27, were admitted into the record as evidence.

At the hearing, issue No. 1 was deleted from consideration because the parties stipulated that the Employer is already liable for Arizona Unemployment Insurance taxes for other covered workers.

The APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. Since 1996, the Employer has used the services of ODPO to patrol the interior and parking lot of a XXXX XXXX business it conducts at a location in Phoenix, Arizona (Tr. pp. 76-78).
2. Because the ODPO are police officers employed by the City of Phoenix Arizona, (CITY), the use of ODPO by the Employer and other users of the services are governed by specific rules (Bd. Exh. 26).
3. Among those rules, is the general statement that: "The officers that are hired by you are to provide you with the same service they would provide the public while in an on-duty capacity."

4. Other rules of the City are:

Officers are not to enforce the rules and regulations of a private employer as a condition of their employment, or at any time while employed by a private employer.

Officers will not enter into any written or verbal contract with any private employer.

Officers will wear their Department uniform at all times while employed with a private employer unless written permission is obtained from a Phoenix Police Precinct/Division Commander.

The salary for officers is determined by the officer and not the Phoenix Police Department (Bd. Exh. 26).

5. If an entity, including the City of Phoenix, wants to use an ODPO, the entity must contact the Off-Duty Work Sergeant (ODWS), with a memo describing the conditions and the number of ODPO required. If the request is approved, a "work number" is assigned to the approved location (Tr. pp. 14, 24, 42, 43). The need for ODPO is posted at police stations (Tr. pp. 36, 41, 42, 63).
6. For every 4 to 5 ODPO assigned to a location, a sergeant is also needed. The sergeant also acts as a coordinator in case an extra ODPO or a substitute is needed. Substitutes do not require an employer's approval (Tr. pp. 14, 24-26).
7. When an ODPO, who reports for a shift the officer has volunteered for, an Employer tells the officer of any expected problems. The ODPO knows the areas he is expected to patrol (Tr. pp. 15, 21, 70, 71, 84). The ODPO is free to take breaks or meals whenever he chooses (Tr. pp. 21-23, 26, 27). The ODPO does not make reports to the Employer, other than as a courtesy, when the ODPO, in the capacity of a police officer, has

handled a matter involving the Employer's business (Tr. pp. 30, 32, 49, 50, 80-84).

8. The ODPO is always subject to be called to be on -duty by events at the Employer or by the local precinct. The Employer has agreed to this (Tr. pp. 16, 28, 29, 77-79; Bd. Exh. 26).
9. The ODPO is paid an hourly rate negotiated with the Employer and invoices the Employer. These rates vary from \$XX to \$XX per hour. When invoicing the Employer for services, the ODPO deducts from the calculations, the time the ODPO is considered to have reverted to an on-duty mode (Tr. pp. 17, 18, 28, 29, 32, 34, 35; Bd. Exh 26).
10. The ODPO is required to wear the police uniform, and may not wear any kind of an Employer's identification. An on-duty police sergeant regularly inspects work number sites to ensure compliance with this rule (Tr. pp. 17, 18; Bd. Exh. 26).
11. An ODPO may, and some do, work for other entities as an ODPO. An ODPO may not enforce the rules and regulations of a private employer as a condition of the ODPO's employment, or at any time while employed by a private employer (Bd. Exh. 26). If an ODPO is asked by an entity to perform services, and the entity does not already have a work number issued by the ODWS, the ODPO informs the entity of the requirements. An ODPO may indicate that he or she will be glad to perform services, if and when, the entity has obtained a work number (Tr. pp. 59, 60; Bd. Exh. 26).
12. The Employer provides a radio to the ODPO for communication on-site with any of the Employer's employees. The ODPO monitors the police radio supplied by the CITY, since the ODPO is subject to being called back on-duty (Tr. pp. 17, 18, 88).

13. The Employer provides no training for an ODPO (Tr. p. 57); makes no reimbursement for any ODPO's expenses (Tr. p. 85); and can cease using the ODPO services (Tr. p. 65).

It is the position of the Employer that ODPO, whose employment is in dispute in this case, are independent contractors and not employees.

Arizona Revised Statutes § 23-615 defines "employment:"

"Employment" means any service of whatever nature performed by an employee for the person employing him,

Arizona Revised Statutes § 23-613.01(A) provides:

Employee; definition; exempt employment

A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished, except employee does not include:

1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristics of an independent profession, trade, skill or occupation.
2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit.
3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.

4. An individual if the employing unit demonstrates the individual performs services in the same manner as a similarly situated class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.

Arizona Administrative Code, Section R6-3-1723 provides in pertinent part:

- A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.

1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.

2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.

- B. "Employee" as defined in subsection (A) does not include:

1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person, independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.

2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit ". . . solely because of a provision of law regulating the organization, trade or business of the

employing unit". This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.

- a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.
- b. "Provision of law" includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.
- c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.

Arizona Administrative Code, Section R6-3-1723(D)(2) identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

Additional factors to be considered in determining whether an individual may be an independent contractor, enumerated in Arizona Administrative Code, Section R6-3-1723(E), are: (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; (6) whether the individual has simultaneous contracts with other persons or firms.

In the application of the guidelines set out in Arizona Administrative Code, Section R6-3-1723(D)(2), our analysis includes the following:

a. Authority over Individual's Assistants

Hiring, supervising and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job.

Here, the ODPO is not permitted by the City to have assistants when performing as an ODPO.

We find that authority over individual's assistants is not a determinative element in finding that the worker is an employee or an independent contractor. **Rather, it is neutral in this case.**

b. Compliance with Instructions

Control is present when the individual is required to comply with instructions about when, where or how he is to work. The control factor is present if the Employer has the right to instruct or direct.

In this case, the Employer has no power, and does not exercise any control, over the way the ODPO performs the duties. The ODPO knows what is to be done and the Employer and ODPO only communicate for information purposes.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

c. Oral or Written Reports

If regular oral or written reports bearing upon the method in which the services are performed must be submitted to the employing unit, it indicates control in that the worker is required to account for his actions. enforce the rules and regulations of a private employer as a condition of their employment, or at any time while employed by a private employer

The ODPO only informs the Employer about incidents of which the Employer should be aware, but does not need to inform the



Employer of the manner in which the ODPO performed the duties.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

d. Place of Work

The fact that work is performed off the Employer's premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee.

Here, the ODPO has only one place to perform the work; the Employer's premises for which security is contracted. City regulations prevent the parties from having work performed for the Employer at other premises unless covered by a work number.

We find that the place of work is not a determinative element in finding that the worker is an employee or an independent contractor. **Rather, it is neutral in this case.**

e. Personal Performance

If the service must be rendered personally, this would tend to indicate that the employing unit is interested in the method of performance as well as the result and evidences concern as to who performs the job. Lack of control may be indicated when an individual has the right to hire a substitute without the Employer's knowledge or consent.

The ODPO may have a substitute perform services for which the ODPO agreed to perform. The Employer has no power to prevent such substitution.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

f. Establishment of Work Sequence

If a person must perform services in the order set for him by the Employer, it indicates the worker is subject to control as he is not free to follow his own pattern of work, but must follow the routine and schedules of the Employer.

The ODPO knows the sequence in which the work is to be performed and is master of his or her own time during the shift selected by the ODPO. It is the ODPO who sets the pattern of work.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

g. Right to Discharge

The right to discharge, as distinguished from the right to terminate a contract, is a very important factor indicating that the person possessing the right has control.

Here, the ODPO may decide to not continue taking a shift originally taken. The ODPO may feel morally obligated to provide a substitute as the ability of other ODPOs to obtain work with the Employer through the ODWS could be jeopardized.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

h. Set Hours of Work

The establishment of set hours of work by the Employer is indicative of control. This condition bars the worker from being master of his own time, which is the right of an independent worker.

The ODPO may take as many or as few shifts of the work number authorized by the ODWS, as the ODPO wishes.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

i. Training

Training of an individual by an experienced employee working with him, or by required attendance at meetings, is indicative of control because it reflects that the Employer wants the service performed in a particular manner.

There is no training as the City advises prospective users of ODPO: "The officers that are hired by you are to provide you

with the same service they would provide the public while in an on-duty capacity.”

We consider this factor significant in determining that the parties’ relationship was that of **independent contractor**.

j. Amount of Time

If the worker must devote his full time to the activity of the Employer, it indicates control over the amount of time the worker spends working, and impliedly restricts him from doing other gainful work. An independent worker, on the other hand, is free to work when and for whom he chooses.

ODPOs are able to take as few or as many shifts as they wish and they are able to obtain substitutes for shifts.

We consider this factor significant in determining that the parties’ relationship was that of **independent contractor**.

k. Tools and Materials

If an Employer provides the tools, materials and wherewithal for the worker to do the job, it indicates control over the worker. Conversely, if the worker provides the means to do the job, a lack of control is indicated.

The only tool provided to the ODPO, by the Employer, is a radio for communication with employees of the Employer. The ODPO needs a police radio in case of being summoned back on-duty.

We find that tools and materials is not a determinative element in finding that the worker is an employee or an independent contractor. **Rather, it is neutral in this case.**

i. Expense Reimbursement

Payment by the Employer of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses.

There are no expenses for which the parties contemplate reimbursement.

We find that absence of expense reimbursement is not a determinative element in finding that the worker is an employee or an independent contractor. **Rather, it is neutral in this case.**

The additional factors enumerated in Arizona Administrative Code, Section R6-3-1723(E) are equally appropriate for consideration in determining the relationship of the parties.

### 1. Availability to the Public

Generally, an independent contractor makes his services available to the general public, while an employee does not.

Nothing prevents an ODPO from working for another employer that complies with City rules for using an ODPO, and nothing prevents an ODPO, from performing other type services for any employer.

The absence of making his or her services available to the general public on a continuing basis is a function of the CITY's requirement for this type of work. That the worker is free to perform services for another entity which complies with the CITY's requirement supports a finding that the worker is an **independent contractor.**

### 2. Compensation

Payment on a job basis is customary where the worker is independent, whereas an employee is usually paid by the hour, week or month.

Although the ODPO is paid on an hourly basis, that is the only practical way of determining the value of the services performed.

We find that the absence of payment on a job basis is not a significant element in finding whether an ODPO is an **independent contractor.**

### 3. Realization of Profit or Loss

An employee is generally not in a position to realize a profit or loss as a result of his services. An independent contractor, however, typically has recurring liabilities in connection with

the work being performed. The success or failure of his endeavors depends in large degree upon the relationship of income to expenditures.

The ODPO is not providing material components plus labor and has no assistants. Therefore, only skill is being provided. That does not mean that the ODPO is an employee.

We find that Realization of Profit or Loss is not a determinative element in finding that the worker is an employee or an independent contractor. **Rather, it is neutral in this case.**

#### 4. Obligation

An employee usually has the right to end the relationship with an Employer at any time without incurring liability. An independent worker usually agrees to complete a specific job.

As with the right to discharge, the Employer may simply cease to use the ODPO skills

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

#### 5. Significant Investment.

A significant investment in equipment and facilities would indicate an independent status of the individual making the investment. The furnishing of all necessary equipment and facilities by the Employer would indicate the existence of an employee relationship.

No significant investment is required by either party in the performance of the services.

We find that absence of significant investment is not a determinative element in finding that the worker is an employee or an independent contractor. **Rather, it is neutral in this case.**

#### 6. Simultaneous Contracts

An individual who works for a number of people or companies at the same time may be considered an independent contractor because he is free from control by one company. However, the

person may also be an employee of each person or company depending upon the particular circumstances.

Here, the typical ODPO cannot advertise the services, but many do other jobs, through the ODWS, although they may not work in the capacity of an employee, because the City does not permit such services to be performed where the user has rules and policies

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

Pursuant to Arizona Administrative Code, Section R6-3-1723(F), there may be other factors not specifically identified in the rule that should be considered.

One such factor in this case is:

The CITY requirement that any ODPO perform services only in uniform, and be prepared to abandon the performance during the time the ODPO has reverted to on-duty status because of an incident at the work number site or because of being recalled to on-duty status by the CITY.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

The factors that tend to support the Employer's contention of independent contractor relationship include:

Compliance with Instructions, Oral or Written Reports, Personal Performance, Establishment of Work Sequence, Right to Discharge, Set Hours of Work, Training, Amount of Time, Availability to the Public, Obligation, Compensation, Simultaneous Contracts.

The factors that are not applicable in this case or are neutral:

Authority over Individual's Assistants, Place of Work, Tools and Materials, Expense Reimbursement, Realization of Profit or Loss, Significant Investment,

There are no factors that tend to support an employer/employee relationship

We have thoroughly examined the facts present in this case and have considered the relevant law and administrative rules as they are applicable to

those facts. We have considered the evidence as it relates to the factors set out in the Arizona Administrative Code, Section R6-3-1723(D) and (E), and conclude that the services performed by individuals as off-duty police officers, do not constitute employment.

Having found that services performed by individuals as off-duty police officers do not constitute employment, we set aside that part of the Reconsidered Determination that found that remuneration paid to individuals for the services performed, constitutes wages. Accordingly,

THE APPEALS BOARD **REVERSES** the Reconsidered Determination issued on January 25, 2006.

Services performed by individuals as off-duty police officers do not constitute employment as defined in A.R.S. §§ 23-613.01, 23-615 or 23-617, and such individuals are not employees within the meaning of A.R.S. § 23-613.01 and Arizona Administrative Code, Section R6-3-1723.

THE APPEALS BOARD **SETS ASIDE** that part of the Reconsidered Determination regarding remuneration.

DATED:

APPEALS BOARD

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MARILYN J. WHITE, Chairman

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HUGO M. FRANCO, Member

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WILLIAM G. DADE, Member

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**PERSONS WITH DISABILITIES:** Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print

materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

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### **RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is \_\_\_\_\_.

### **INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION**

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. A request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1140 E. Washington, Box 14, [Suite 104], Phoenix, Arizona 85034. Telephone: (602) 229-2806. A request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.
2. Parties may be represented in the following manner:  
  
An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.
3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such a request for review is a prerequisite to any further appeal.



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A copy of the foregoing was mailed on  
to:

(x) Er: Rep: XXXXXXX X. XXXXX, XXX., Acct. No: XXXXXXXX

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By: \_\_\_\_\_

For The Appeals Board